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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EXXON CORPORATION,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI

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This reply brief addresses new matters occurring since Petitioner's original filing, as well as the arguments raised in the Federal Trade Commission's ("FTC") brief in opposition.

I. SINCE PETITIONER'S ORIGINAL FILING, THIS COURT IN *FEDERATED DEPARTMENT STORES, INC.* v. *MOITIE* HAS CONFIRMED THAT THERE EXIST SERIOUS DOUBTS ABOUT WHETHER PETITIONER CAN EXPECT ANY FURTHER RELIEF FROM THE NINTH CIRCUIT DESPITE THE TERMS OF ITS ORDER

When the Ninth Circuit dismissed Petitioner's appeal from the Franchise Rule, it did so with the comment: "The petitions for review . . . are dismissed, without prejudice to the right of the petitioners to contest the validity of the rule on its application in any future

proceeding." (Appendix A to Petition.) As indicated in Petitioner's initial brief, there exists substantial doubt as to the authority of the Ninth Circuit to render a dismissal of this case on appeal on the merits "without prejudice."

Subsequent to the filing of this petition for a writ of certiorari, this Court decided *Federated Department Stores, Inc.* v. *Moitie*, 49 U.S.L.W. 4687 (U.S. June 15, 1981), a case arising out of the Ninth Circuit involving a specific application of that court's questionable approach toward the final effect of a dismissal. In *Federated*, the Ninth Circuit applied a *"simple justice"* concept to permit an otherwise dead appeal to possess continuing vitality, similar to the objective the Ninth Circuit sought to accomplish with its order here. Of major significance to the instant proceeding, this Court in *Federated* overruled the Ninth Circuit in light of the basic rule of *res judicata* which precludes a party or its privy from relitigating issues that were or could have been raised in the original action, stating:

> A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. . . . Nor are the *res judicata* consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.

49 U.S.L.W. at 4689. Similarly here, the Magnuson-Moss Act, which provided the statutory basis for Petitioner's appeal from the Franchise Rule, provides that an appeal must be filed within 60 days and that certain procedural and evidentiary aspects of a rule "may be reviewed only in [such] a proceeding." (*See* Appendix E at 15a-17a of the Petition.)

The Court's holding in *Federated* may create an irreconcilable conflict with the Ninth Circuit's statement in

its Order that the validity of the Franchise Rule could be "litigated anew" if another case or controversy arises concerning the sale of franchises other than service stations. Unless the Court hears this petition and instructs the Court of Appeals for the Ninth Circuit to correct its erroneous dismissal of this litigation, later courts facing the issue of the validity of the Franchise Rule in "any future proceeding" may be powerless to correct the manifest injustice caused by the Ninth Circuit's dismissal.

II. THIS CASE HAS SIGNIFICANT IMPLICATIONS AS TO THE ABILITY OF THE JUDICIARY TO EFFECTIVELY REVIEW AGENCY ACTION

The FTC has not challenged, nor can it challenge, Petitioner's assertion that the Franchise Rule was illegally promulgated.[1] Nor does it deny that it has systematically tried to evade judicial review. In the course of formulating the Rule, the FTC accumulated more than 10,000 pages of secret comments from franchisors whose economic interests differ from Petitioner's interests regarding the merits of the Franchise Rule. Petitioner was never provided an opportunity to comment on the substance of any of these *ex parte* contacts prior to the promulgation of the Franchise Rule. If the FTC's strategy of systematically evading judicial review prevails, and the Ninth Circuit's Order remains unreviewed, it is possible that no court will ever have the opportunity to review an illegal substantive rule governing a significant segment of the economy.

The FTC persists in its evasionary tactics, characterizing its July 17, 1980 Exemption Order as "permanent and unqualified." (Brief for the FTC in Opposition at 7 n.6.) But the FTC glosses over the fact that the ex-

[1] For purposes of determining whether this litigation is moot, the court should accept as true all of Petitioner's material allegations. *See Warth* v. *Seldin*, 422 U.S. 490, 501 (1975).

emption is not all encompassing. The illusion of a complete exemption created in the FTC's brief equates the FTC's exemption proceeding (which is not part of this appeal) with the appeal here which involved *all of Petitioner's business operations.* As to the non-service station operations of Petitioner, the FTC asserts only that "it knows of no other businesses of Exxon that might be covered by the Rule. . . ." (Brief for the FTC in Opposition at 5 n.2.)

Such qualified assurances simply cannot moot an appeal under longstanding precedent in this Court and in the lower courts. Under the Commission's own procedural rules, informal advice given by the FTC is not final, but is "without prejudice to the right of the Commission to reconsider the questions involved. . . ." FTC *Organization, Procedures, Rules of Practice, and Standards of Conduct* § 1.3(b) (rev. Feb. 20, 1979).[2] *See Grubb* v. *Oliver Enterprises, Inc.*, 358 F. Supp. 970 (N.D. Ga. 1972). If the FTC is successful in blocking judicial review of the Franchise Rule on the basis of a qualified and non-binding opinion, there will be nothing to bar the agency from deciding that the Rule is applicable to Petitioner[3] at a later point in time when the 60-day statutory period for direct appeals has run.

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[2] The rule provides in pertinent part:

> *Any advice* given by the Commission is without prejudice to the right of the Commission to reconsider the questions involved and, where the public interest requires, to rescind or revoke the action.

Id. (emphasis added).

[3] One such shift in views has already occurred here. On October 5, 1979, the FTC issued an informal advisory opinion to Marathon Oil Company concluding that rental payments made by Marathon's branded independent service station dealers and jobbers pursuant to Service Station Leases and Jobber Leases would be considered "required payments" as that term is used in the Franchise Rule.

The FTC does not dispute that the judicial review provisions of the Magnuson-Moss Act were considered by Congress to be crucial. (*See* Petition at 8-13.) Under the Ninth Circuit's Order, the FTC has thus far wholly frustrated a serious challenge to the validity of the Franchise Rule simply by offering non-binding advice. The Ninth Circuit's opinion provides the FTC with the same type of "powerful weapon against public law enforcement" condemned by the Court in *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953).

III. A PARTIAL AND NON-BINDING OPINION DOES NOT RENDER PETITIONER'S CHALLENGE TO THE VALIDITY OF THE FRANCHISE RULE MOOT

The purpose of Petitioner's suit was to challenge the serious procedural violations engaged in by the FTC in promulgating the Franchise Rule and the total lack of any evidentiary support for it. Petitioner argued, *inter alia*, that the Rule was invalidly promulgated, and that Petitioner was illegally denied participation in certain crucial meetings pertaining to the contents of the Rule. To date, the only relief which Petitioner has received is a partial exemption and some qualified advice. It cannot be said that because of such limited relief, "the issues presented are no longer 'live' or [that] the parties lack a legally cognizable interest in the outcome." *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969).[4] Such advice

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Less than one year later, on September 30, 1979, the FTC concluded that such payments, to the extent they had not been exempted by virtue of the July 17, 1980 Exemption Order, did *not* constitute "required payments."

[4] The numerous standing cases cited by the FTC do not suggest a contrary conclusion. A party has standing whenever it "has

clearly fits within the doctrine of conduct which is "capable of repetition yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911); *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975). Voluntary cessation of the challenged conduct does not render a

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suffered 'some threatened or actual injury resulting from the putatively illegal action . . . .'" *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975), *quoting Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 (1973). The impact of the Rule on Petitioner's daily business operations and the inevitable impact on new business opportunities alone is sufficient injury to give Petitioner standing. *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

Standing can also be established when a legal interest created by a statute is invaded, even if there would be no injury without such a statute. *Warth* v. *Seldin*, *supra*, at 500; *Linda R.S.* v. *Richard D.*, *supra*, at 617 n.3; *Trafficante* v. *Metropolitan Life Ins. Co.*, *supra*, at 212. In this case Petitioner has alleged injury from a violation of certain provisions of the Administrative Procedure Act which has in no way been remedied by the FTC's Exemption Order. The Exemption has done nothing to repair the deprivation of Petitioner's right to participate fully in any presentation of evidence concerning the contents of the rule being promulgated by the FTC. 5 U.S.C. §§ 553, 556 (1976 & Supp. III 1979).

Further, the FTC's argument that Petitioner does not have standing is in direct conflict with the basic principle that a party should not have to subject itself to the risk of an enforcement proceeding in order to obtain judicial review. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). *See also Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) (a party can challenge a statute prior to its effective date when it is inevitable that the party will be affected by the statute); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) (suit to challenge statute was not premature, although it was brought before the statute's effective date); *McCoy-Elkhorn Coal Corp.* v. *EPA*, 622 F.2d 260 (6th Cir. 1980) (suit challenging certain proceedings under the Clean Air Act was proper before the termination of the proceedings because their very existence was impairing business opportunities); *Crossen* v. *Breckenridge*, 446 F.2d 833, 838 (6th Cir. 1971) (litigants need not subject themselves to the possible harm of a criminal prosecution before seeking relief from an allegedly unconstitutional statute).

controversy moot. *United States* v. *W. T. Grant Co.*, *supra*. The burden of establishing that the challenged wrong will not be repeated is a heavy one, *Ciudadanos Unidos de San Juan* v. *Hidalgo County Grand Jury Commissioners*, 622 F.2d 807, 825 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 1479 (1981), and the FTC has failed to meet that burden. The FTC repeatedly refused to stipulate with Petitioner that it will not apply the Franchise Rule to any of Petitioner's businesses. Nowhere in its brief does the FTC state unqualifiedly that the Franchise Rule will never be applied to Petitioner's business. If the party claiming mootness fails to establish that there is no "reasonable expectation" that the alleged violation will recur, the case is not moot. *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979).

Despite the limited exemption and the FTC's tentative advice as to Petitioner's other business endeavors, Petitioner must make business decisions daily in structuring its various operations which the FTC may later claim are significantly impacted by the Rule. Under Section 18(e)(1)(A) of the Federal Trade Commission Act, 15 U.S.C. § 57a(e)(1)(A) (1976 & Supp. III 1979), "*any interested person (including a consumer or consumer organization)*" has a right to challenge the validity of a rule promulgated by the FTC. (Emphasis added). Certainly Petitioner, who operates many businesses which may be challenged under the Rule, cannot have less of a "legally cognizable interest" in the validity of the Rule than a consumer or an organization of consumers.[5]

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[5] Indeed, even if the Ninth Circuit determined that the Franchise Rule was moot as to its businesses, Petitioner would still retain the right to challenge the validity of the Rule as a consumer since it purchases many services from franchises, *e.g.*, rental cars, temporary employees. Although the FTC cavalierly dismisses this idea (FTC Brief in Opposition at 6 n.3), it ought to be beyond dispute that a corporation the size of Exxon would have standing either as an "interested" person or as a consumer under this statutory provision. 15 U.S.C. § 57a(e)(1)(A) (1976 & Supp. III 1979).

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, Petitioner seeks a summary remand to the Court of Appeals for the Ninth Circuit for further consideration in light of the Court's decision in *Federated Department Stores, Inc.* v. *Moitie, supra.*

Respectfully submitted,

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